STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATEWIDE UNIVERSITY POLICE ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-117-H PERB Decision No. 366-H December 16, 1983

Appearances; Robert A. Jones, Representative for Statewide University Police Association, Donald L. Reidhaar, James N. Odle and Marcia J. Canning, Attorneys for the Regents of the University of California.

Before Tovar, Morgenstern and Burt, Members.

DECISION AND ORDER

BURT, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Statewide University Police Association (SUPA) to the attached proposed decision of the administrative law judge (ALJ) and the response of the Regents of the University of California (University). SUPA excepts to the dismissal of its charges alleging that the University violated subsections 3571(a), (b), (c) and (d) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by the conduct of a police chief who made promises of benefits

[1]The HEERA is codified at Government Code section 3560 et seq.

to bargaining unit employees conditional upon abandonment of their membership in SUPA.

The Board has carefully reviewed the entire record in this case in light of the exceptions and the response thereto. We adopt the ALJ's findings of fact and conclusions of law, and hereby ORDER the unfair practice charge in Case No. SF-CE-117-H DISMISSED.

Members Tovar and Morgenstern joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATEWIDE UNIVERSITY POLICE ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-117-H PROPOSED DECISION (2/25/83)

Appearances; Robert A. Jones, representative for the Charging Party, Statewide University Police Association; Marcia J. Canning, attorney for Respondent Regents of the University of California.

Before; Marian Kennedy, Administrative Law Judge •

PROCEDURAL HISTORY

On May 7, 1982, the Charging Party, Statewide University Police Association (hereafter SUPA) filed an unfair practice charge against the Respondent, Regents of the University of California (hereafter Respondent or UC) alleging that Respondent violated sections 3571 (a), (b), (c) and (d) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or the Act).[1] The charge alleged that a supervisor of Respondent made promises of benefits to bargaining unit

[1]HEERA is codified at California Government Code section 3560, et seq., all section references are to the Government Code unless otherwise stated.

employees conditional upon abandonment of their membership in SUPA.

A complaint was issued on June 10, 1982, and Respondent filed its answer on June 30, 1982, admitting certain facts but denying that parts of the alleged statements were made and denying that any statements actually made constituted an unfair practice.

An informal conference was conducted by an administrative law judge of the Public Employment Relations Board (hereafter PERB or the Board) on July 1, 1982, in Berkeley, California but the dispute was not resolved.

A Notice of Hearing was issued on July 27, 1982, and a formal hearing was conducted by Administrative Law Judge Gerald Becker[2] on November 1 and 2, 1982, in Santa Barbara. After each party filed briefs, the matter was submitted for proposed decision on January 19, 1983.

FINDINGS OF FACT

At all times relevant herein SUPA was the exclusive representative of police officers employed by Respondent.

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[2]The undersigned Administrative Law Judge was assigned to decide this case pursuant to PERB Regulation 32168(b) after Mr. Becker left the employ of the PERB. As is evident from the discussion that follows, the decision herein does not depend upon any credibility resolutions between conflicting testimony of the various witnesses. Therefore, Respondent's "motion," made in its post-hearing brief, to reopen the record for additional testimony if the decision herein must turn on the credibility of witnesses is hereby denied.

Respondent and SUPA engaged in collective negotiations which reached impasse in February 1982 and were at impasse at the time of the following events.

On April 26, 1982 Russell E. Stone, Chief of Police at the UC Santa Cruz campus and a member of the UC collective bargaining team, was interviewed at Santa Barbara for the position of Chief of Police of the UC Santa Barbara campus. One of the several interview panels with which Stone met was a panel made up of rank and file employees of the Santa Barbara campus police department. That interview covered a number of subjects which were raised in questions put to Stone by the panel members. At some point during the interview, either in response to a question or on his own initiative, Stone made the statements discussed below.[3] The record does not reveal

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[3]The parties dispute some of the details of Stone's challenged statements and certainly the inferences to be drawn therefrom, but the essence of Stone's statements is the same in both his testimony and that of SUPA President Daniel Hilker. Stone did not testify to the precise order of his statements. The order reconstructed herein is based upon the testimony of Daniel Hilker to the extent that it is uncontradicted. The particular order of the statements is not crucial since Stone testified that the entire exchange in dispute took only 1 to 1-1/2 minutes.

The testimony of the other two employee witnesses is also generally consistent with the facts stated below. Their testimony is not discussed separately because neither witness had a very clear memory of what Stone said and tended, much more than Stone and Hilker, to testify to general impressions of the conversation rather than Stone's actual statements. Hilker and the other two employee witnesses also testified regarding their personal reactions to and interpretations of Stone's statements.

anything about other subjects discussed at the interview.

Either in response to a question or on his own initiative,[4] Stone told the employees on the panel at the interview that he felt that collective bargaining was "a shame". He said:

> I think the University is a good employer. I don't like the adversary climate that it [collective bargaining] causes and the umbrella of collective bargaining that makes it really hard to, you have to watch your words, be careful what you say.

SUPA President, Daniel Hilker, who was present as a member of the interview panel responded with: "I really don't want to hear this." Stone responded: "[Y]ou must be the union president," and Hilker answered: "Yes I am."

Stone commented that what he was saying "might be an unfair practice charge". He stated that his employees at the Santa Cruz campus were going to withdraw from SUPA because "they were disenchanted based on the lack of communication." Stone testified that he said further:

> [L]et me tell you something else, the University chiefs met at UCLA this month and we discussed recruitment and retention and the Olympics and the fact that we're 11 percent behind the Cal State system. And we, then, decided an end-run, some way we could go back to our individual chancellors

[4]There is a conflict in the testimony regarding whether or not Stone's comments on collective bargaining were in response to a question or initiated by him. While the difference might be important in some circumstances, based upon the analysis of the comments set out below, I find the distinction not determinative here.

> and see if they could go to Systemwide and see if we really were Broke or there was, in fact, monies available.

On further examination by Respondent's attorney, however, it became clear that Stone did not in fact say everything just quoted. He did make a reference to the chiefs making an "end-run" to try to get police officers an 11 percent raise and he may have said that the UC police officers were 11 percent behind the Cal State system in wages. However, Stone's actual statement about an "end-run" did not refer to either an end-run through the chancellors around systemwide or an end-run around collective bargaining or the union.

Hilker's version of Stone's statements does not differ substantially from Stone's except with regard to Stone's alleged derogatory characterization of SUPA. Hilker testified that Stone raised the issue of the union in the context of saying why he wanted to be chief in Santa Barbara. He "made mention to our group about our union being sour, having a sour union."

> After he made mention about the union, he started to go into a little more about the bargaining process, and I advised him that this was not the forum to be speaking about collective bargaining . . . .
>
> After I made mention that I didn't think that he should be talking, he confronted me with, "who are you, the union president?" And I said, I am, but that really wasn't an issue. And he went on to say that, well, what I'm going to say now is probably an

> unfair labor practice, but I'm going to say it anyway . . . .
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> He said that all of his officers at Santa Cruz had given him letters saying that they wished to withdraw from the union and that he was taking care of them on his own there, and that he was trying to do things for the union by him and several other chiefs "doing an end-run and trying to get us 11 percent." (TR. p. 26)

Stone testified that prior to the parties reaching impasse in negotiations and prior to the date of the interview in question, Respondent had made no offer of wage increases to SUPA greater than 6 percent.

Respondent presented testimony from the three police officers working at the Santa Cruz campus who had been SUPA members but who had withdrawn their memberships in February of 1982. All three witnesses testified that they withdrew out of dissatisfaction with SUPA and not because of any pressure or promises by Stone. One witness testified that he had told Stone of his withdrawal of membership and the reasons therefor.

Respondent also presented evidence to show Stone's generally positive attitude toward police officer unions. Both Stone and another witness testified that Stone had been a member of and had actively supported a union of police officers in his former position with the Pasadena police force during the period variously identified by Stone as 1966-1968 and by the other witness as 1971-72.

Finally, Respondent offered the following letter in support

of its argument that even if Stone's statements did constitute an unfair practice, the violation had been cured by Respondent disavowing the misconduct. The letter was addressed to all police employees, dated May 24, 1982, signed by Thomas M. Mannix, Director of Collective Bargaining Services on the letterhead of the Office of the General Counsel, and carried a reference to the charge number which is the subject of this case. It read:

> Very recently, the Statewide University Policeman's Association filed an unfair practice charge against the University of California. The charge alleged that a police chief (and member of the bargaining team) made certain statements in front of unit employees about SUPA's effectiveness at bargaining and due to this the charge alleged that the University is not bargaining with SUPA in good faith.
>
> The Regional Office of the Public Employment Relations Board, where the charge was filed, has not yet determined if the charge sets forth a violation under the statute, the Higher Education Employer-Employee Relations Act. No complaint against the University has issued at this time.
>
> The Public Employment Relations Board must initially determine if the charge itself "as stated" sets forth a violation. If it makes this determination the case will be set for hearing which will give both parties an opportunity to set forth their versions. An Administrative Law Judge will first decide at that time if the statements were made as alleged and, if so, the Judge will determine if the statements made constitute an unfair practice.

> It must be left to the Public Employment Relations Board processes, as set forth above, to make these determinations. It is not legally permissible for the University to deal directly with employees about the merits of the charge. However, without addressing these matters, I want to reassure all employees that the alleged statements in the charge filed by SUPA do not reflect the position of the University's bargaining team or of The Regents of the University of California.
>
> The University of California recognizes that police employees have collective bargaining rights and we have been bargaining in good faith and will continue to bargain in good faith with SUPA, with the intent to reach a contract.

A police officer witness employed at the Santa Barbara campus testified that he recalled seeing the above letter posted on the bulletin board at the police station "around May". No testimony was offered regarding how long the letter was posted.

ISSUES

1. Whether statements made by Stone at the April 26, 1982 interview with bargaining unit employees constituted a promise of benefits to employees conditioned upon their withdrawal from membership in SUPA in violation of HEERA section 3571(a), (b), (c) and (d).

2. Whether the notice to all police employees posted by Respondent in May 1982 cured any unfair practice which may have been committed as stated in 1.

CONCLUSIONS OF LAW

SUPA contends that the statements made by Stone[5] in front of employees constitute violations of the following subparagraphs of section 3571 of HEERA:

> 3571. It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; . . .

Specifically, SUPA contends that section 3571 was violated in that Stone's statements constituted an offer directly to employees of higher raises than had been offered to SUPA in collective negotiations (11 percent versus 6 percent) with the implication that such higher raises would result from

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[5]There is no dispute that Stone's statements are attributable to Respondent. Stone was a supervisor and a member of Respondent's collective negotiating team.

employees' withdrawing their membership from SUPA. Although SUPA does not offer a separate theory for each of the subsections of 3571 allegedly violated, the possible violations will be discussed separately.

The Alleged Section 3571(a) Violation

HEERA section 3571.3 provides:

> The expression of any views, arguments, or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

With the exception of the addition of the last clause, this section is identical to NLRA section 8(c). In Rio Hondo Community College District, supra, the PERB adopted NLRB precedent with respect to section 8(c) and held that it would evaluate allegedly unlawful employer speech to determine whether it "contains a threat of reprisal or force or promise of benefit".[6]

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[6]The Board also noted that otherwise protected employer speech may escape protection if it is a direct communication with employees and evidences an employer's attempt to bypass the exclusive representative. This aspect of Respondent's speech will be discussed below with regard to the 3571(b) and (c) violations.

The Rio Hondo case arose under the Educational Employment Relations Act which does not contain any provision similar to

If a challenged statement by an employer contains no threat of reprisal or force or promise of benefit, then it constitutes speech protected by section 3571.3 and cannot, except in very limited circumstances, be the subject of an unfair practice finding. If, on the other hand, a threat of reprisal or force or promise of benefit is found in the challenged statement, then such statement would violate 3571.1(a) if it "tends to or does result in harm to employee rights" granted under the HEERA and the employer does not show an overriding operational necessity justification for the statement.[7]

Applying the Rio Hondo standard, the statements made by Stone to bargaining unit employees do not contain any threat of reprisal or force or promise of benefits. Stone testified that he said that he thought that collective bargaining was a "shame" and that he did not like the "adversary climate" which collective bargaining created. These statements are permissible expressions of opinion. Even Stone's alleged disparagement of SUPA as a "sour union", which Stone denies saying, falls within the scope of protected speech. Both the

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NLRA section 8(c) or HEERA section 3571.3. Since the PERB was willing to apply NLRB precedent regarding section 8(c) in those circumstances, it would obviously apply the same precedent under HEERA which contains a "free speech" clause identical to 8(c).

[7]Novato Unified School District (4/30/82) PERB Decision No. 210; Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

PERB and NLRB have held that statements of opinion about a union, and even statements disparaging a union, are protected expression of opinion so long as they do not contain threats or promises.[8]

The remainder of Stone's statement was, according to his testimony, that his employees at the Santa Cruz campus were going to withdraw or had withdrawn from SUPA because they were disenchanted with it based on the lack of communication, that the officers were paid 11 percent below the Cal State system, and that he and the other chiefs were making an "end-run" to try to get more money for police employees.

Hilker's version was that Stone said that the Santa Cruz officers had given him letters that they wished to withdraw from the union and that he was taking care of them on his own there, and that he "was trying to do things for the union by him and several other chiefs 'doing an end-run and trying to get us 11 percent'".

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[8]Santa Monica Unified School District et al. (5/24/78) PERB Decision No. 52 (no violation where supervisors expressed discontent with employee association because their classifications were excluded from the bargaining unit.); Fieldcrest Mills, Inc. (1982) 259 NLRB No. 98 [109 LRRM 1082] (supervisor told employees that union "wouldn't be any good" and they "were just talking and wasting our money as far as paying union dues"); R.J. Reynolds Tobacco Co. (1979) 240 NLRB 620 [100 LRRM 1350] (employer told employee that union was union of socialists and communists that liked to burn and destroy businesses); Elano Corp. (1975) 216 NLRB 691 [88 LRRM 1485] (employer made disparaging and profane remarks regarding the union which showed his contempt and hatred for unions).

Certainly neither version of these statements contain an explicit conditional promise of benefits. The worst conclusion that could reasonably be drawn from these statements by bargaining unit employees listening to them is that some employees were no longer supporting the union and that Stone believed that those employees did not need the union to get them raises because the chiefs were trying to get the police officers an 11 percent raise.

What is missing from these statements is any reasonable implication that the efforts of the chiefs to get higher raises for employees was either conditional upon employees abandoning the union or something to be accomplished outside the bargaining process.

The only factual basis for an argument that Stone was promising employees additional benefits conditional upon their abandoning SUPA is the juxtaposition of his comments about police officers leaving SUPA because of dissatisfaction with it with his further comments about the chiefs trying to do an "end-run" and get more money for police officers. No conditional promise can reasonably be read into these two statements taken together. Rather Stone appeared simply to be bragging that the chiefs were doing a better job on behalf of employees than the union.

That the statements cannot be reasonably interpreted as an effort or threat to circumvent the bargaining process, is also

evident from the context. The employees present at the interview with Stone were aware that SUPA had been bargaining with Respondent and that negotiations had reached an impasse. They may or may not have known that the amount of pay raises to be given employees was one of the unresolved issues.

The employees present must also have known that the chiefs themselves did not control the budget for salaries but rather that the budget was controlled centrally for the University system. Thus, that the chiefs would have to make an "end-run" to try to get more money for police officers makes sense in the context in which the parties were bargaining.

Moreover, Hilker's version of Stone's statement supports Stone's explanation of his "end-run" comment. Hilker quoted Stone as saying that he "was trying to do things for the union by him and several other chiefs 'doing an end-run and trying to get us 11 percent[1]". That statement does not indicate an attempt to circumvent the union or to interfere with its representation of employees.

Finally, Stone's statement cannot reasonably be interpreted as an offer or promise of anything. Stone said that the chiefs were "trying to get" employees higher raises. There was no indication in anything that Stone said that he was in any position to offer or was actually offering any higher raises.

This reading of Stone's comments is particularly appropriate in light of the context in which the statements

were made. Stone was being interviewed by a panel of employees for the job of Chief of Police. He had no authority over those employees since they were all employed at the Santa Barbara campus and Stone was chief at the Santa Cruz campus. If anything, contrary to the normal distribution of power in employer-employee relations, the employees in these circumstances were in a position of some power in relation to Stone since they presumably had some input into whether he would be hired for the job. At the very least, these were not circumstances which would tend to cast Stone's statements in a more ominous light than they appear on their face. The most reasonable interpretation of Stone's comments in this context was that he was attempting to look to his interviewers like a good chief who takes care of his officers.

For all the above reasons, I conclude that bargaining unit employees hearing Stone's comments could not reasonably find them to contain any threat of reprisal or force or promise of benefit.[9] The allegation of 3571(a) violation will be dismissed.[10]

9see Butler Shoes (1982) 263 NLRB No. 150 [111 LRRM 1225] and cases cited therein. In Butler, the NLRB found that statements to bargaining unit employees, that benefits will be no better under a union and that it is the company which sets the wage policy and provides job security, not the union, are simply protected expressions of Respondent's opinion of the relative merits of unionization within section 8(c) of the NLRA.

[10]Over objection, SUPA presented testimony from Hilker and two other witnesses to Stone's statements, regarding their

The Alleged 3751(b) and (c) Violations

SUPA also alleges that the same statements by Stone constitute violations of 3571(b) and (c): denial of employees organizational rights and failure to engage in meeting and conferring with the exclusive representative. Both allegations are presumably based upon the claim that Stone's

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interpretation of Stone's remarks. Hilker and one other employee testified that they interpreted Stone's statements as an offer of a higher wage increase, outside of collective bargaining, if employees abandoned SUPA. The third employee said that he thought Stone was just trying to "sort of impress us with his ability to handle things as chief and sort of instill some confidence in the chiefs as representatives of the police officers."

The evaluation of whether statements of an employer interfere with employees' rights, however, is made on an objective rather than subjective basis. The charging party need only show that the employer's actions would tend to coerce a reasonable employee. (Gorman, Basic Text on Labor Law (West 1976) p. 132.) The NLRB has held that the fact that employees may interpret statements which contain only protected expressions of opinion as threats does not render those statements unlawful. The subjective reaction of employees is not controlling. BMC Manufacturing Corp. (1955) 113 NLRB 823 [36 LRRM 1397] .

Although PERB has not yet specifically addressed the question of whether evidence of the subjective impact on employees or employer conduct is relevant in assessing whether that conduct constitutes interference with employee rights, in Rio Hondo Community College District, supra, the Board held that it would assess the legality of employer speech "in light of the impact that such communication had or was likely to have on the . . . employee [who] may be more susceptible to intimidation or receptive to the coercive import of the employer's message." The Board then evaluated the employer's statements at issue in that case on the basis of how those statements could be "reasonably viewed" by employees, thus using an exclusively objective analysis. Therefore, evidence of the employees' subjective reactions to Stone's statement here is not determinative and should have been excluded.

comments constituted an offer directly to employees of an 11 percent raise, although Respondent had never offered more than a 6 percent raise to the union at the bargaining table.

While making an offer directly to employees of benefits greater than those offered to the union prior to impasse would constitute a violation of 3571(c) and derivatively of (a) and (b)[11] as found above, no such offer was made in Stone's comments. Not every comment of an employer to employees concerning subjects of negotiations will be interpreted as an attempt to bypass the union. In Television Wisconsin,![12] the NLRB held that there was no illegal attempt to bypass the union when a supervisor called an employee at home, discussed several points that were in negotiation between the employer and union, and told the employee how many of his coworkers had resigned

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[11]Direct dealing with employees: General Electric Mfg. Co. (2nd Cir. 1969) 418 F.2d 736, 762 [72 LRRM 2530, 2551], cert. den. (1970) 397 U.S. 965 [73 LRRM 2600].
Derivative violations: North Sacramento School District (1981) PERB No. 193; San Francisco Community College District (1979) PERB No. 105.

[12](1976) 224 NLRB 722, 764-65 [93 LRRM 1494, 1501]. Cases in which the NLRB has found that the employer illegally attempted to bypass the union involve far more unequivocal and egregious conduct than that alleged here. See, e.g. Cincinnati Cordage & Paper Co. (1963) 141 NLRB 72 [52 LRRM 1277] (employer and supervisors on several occasions told employees that they would be better off and get a better deal if they bargained with the employer directly; employer said he cannot give employees more money or do them any favors so long as they have a union); Houston Sheet Metal Contractors Ass'n (1964) 147 NLRB 774 [56 LRRM 1281] (although there was no impasse in bargaining, the employer offered strikers increased benefits and wages if they would return to work on a "non-union" basis).

from the union. The Board found that there was no evidence that these comments were part of a campaign to bargain with the union through employees rather than with employees through the union. As discussed above, the interview context in which Stone's statements made in this case reinforces their innocent nature.

I conclude that Stone's comments do not constitute an attempt to bypass the collective bargaining representative or a failure to meet and negotiate in good faith. No violation of section 3571(b) or (c) is found.

The Alleged 3571(d) Violation

SUPA presented no facts, apart from those already discussed, to support its allegation of a 3571(d) violation. Section 3571(d) makes it unlawful for an employer to:

> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. . . .

This section is concerned with preventing an employer from either usurping the role of the employee association to a greater or lesser extent by assuming some degree of internal control over union policy-making or favoring one employee association over another. No facts were presented even

arguably addressing this allegation.[13] Accordingly, this part of the charge will also be dismissed.[14]

PROPOSED ORDER

Based upon the findings of fact, conclusions of law, and the record, the entire charge and complaint are hereby DISMISSED.

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[13]Even if the section 3571(a), (b) and (c) violations had been proved, a section (d) violation is not an automatic derivative of those other violations but requires separate proof of facts showing actual dominance or interference with the internal running of the union or the impermissible contribution of support of it. Sacramento City Unified School District (4/30/82) PERB Decision No. 214; Santa Monica Community College District (9/21/79) PERB Decision No. 103. See also Gorman, Basic Text on Labor Law, pp 195-208.

[14]Since no unfair practices have been found, it is not necessary to address whether the notice posted by Respondent disavowing any unlawful implications in Stone's statements would be sufficient to cure those violations and justify dismissal of the complaint.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 17, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on March 17, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305 .

Dated: February 25, 1983

Marian Kennedy
Administrative Law Judge